Petition

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CASE NO _____

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER, 1981

MAGGIE JENKINS, Administratrix
of the Estate of Bobbie Lee Hicks,
deceased
Petitioner

V.

RALPH E. KREIGER, Sheriff of
Cuyahoga County
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF OHIO

PETITION FOR CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether a Plaintiff in a 42 U S C § 1983 damage claim brought in a state court has a federally protected right to a trial by jury based on the Seventh Amendment to the United States Constitution or Congressional intent.
2. Whether a Plaintiffs federally protected right to a trial by jury in a 42 U S C §1983 damage claim brought in state court requires reverse of an order granting a new trial on grounds outside those in the moving parties motion where the grounds are not specified in accordance with federal law.
3. Whether the Seventh

Amendment to the Constitution
of the United States applies
to Civil Actions arising in
State Courts, through the
due process clause of the
Fourteenth Amendment..

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GROUNDS FOR JURISDICTION

This petition is within the time limit for filing as specified in 28 U S C §2101(c). The judgment in the Supreme Court of Ohio was entered on July 22, 1981. 28 U S C §2101(c) allows a petitioner for a writ of certiorari in a civil suit ninety (90) days from the date of entry of the judgment below.

The Supreme Court of the United States has jurisdiction to review the decision of the Supreme Court of Ohio in this case on certiorari under 28 U S C §1257 (3),

which allows final judgments of the highest court of a State to be reviewed by writ of certiorari where "any title, right privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of ... the United States."

CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

TITLE 42, UNITED STATES CODE, SECTION 1983

Every person who under color of any statute, ordinance,

regulation, custom or usage of any state, subjects or causes to be subjected any citizen of the United States or other person to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the parties injured in an action at law.

OHIO REVISED CODE SECTION 311.05

The Sheriff shall be responsible for the neglect of duty or misconduct in office of each of his deputies.

SECTION 341.01

A Sheriff shall have charge of the County Jail and all persons confined therein. He shall keep such persons safely, attend to the jail and

OF COUNSEL:
LEONARD LANE

govern and regulate the jail according to the rules and regulations prescribed by the Court of Common Pleas.

RULE 59 NEW TRIALS

(D) On initiative of Court. Not later than fourteen days after entry of judgment the Court of its own initiative may order a new trial for any reason for which it might have granted a new trial on Motion of a Party.

The Court may also grant a Motion for a New Trial, timely served by a party, for a reason not stated in the party's motion. In such case the Court shall give the parties notice and an opportunity to be heard on the

matter. The Court shall specify the grounds for new trial in the order.

STATEMENT OF THE CASE

This action arises out of the death of Bobbie Lee Hicks on May 15, 1971, at the Cuyahoga County Jail. The Complaint was brought by Maggie Jenkins, Administratrix of the Estate of Bobbie Lee Hicks, the decedent's mother. On October 6, 1970, Appellee's decedent was confined in the County Jail. At about 5:00 on the morning of May 15, 1971, he was involved in a fight with another inmate, Leroy Scharf. During the fight, Hicks sustained injuries to his head and both arms for which he was transported to Cleveland Metropolitan

General Hospital for treatment of said injuries. A cast was placed on his left hand and sutures were applied to the head to the head wound R. 1-6.

Petitioner's decedent was then transported back to the County Jail and was thrown into solitary confinement as punishment for his being involved in the fight with Scharf. He did not receive an impartial hearing on the intended disciplinary action R.7,8.

Hicks was placed in solitary or "the hole" at some time between 12:15 p.m. and 1:00 p.m. There was no security checks made of his cell from this time until his body was found, R. 9, 10, 11. However,

during that time inmates in the adjacent dormitories smelled smoke and heard screams and kicking coming from the isolation area. Reports were made to the deputies, but no jail officials came to determine exactly what was transpiring in the isolation area, R.12, 13, 14-15, 16. At approximately 5:55 p.m. Hick's burned body was found. The cell also contained a partially burned mattress and several burned matches. A jail nurse was summoned and she reported that Hicks had a pulse, R. 17, 18. The body was transferred by police car to St. Vincent Charity Hospital where Hicks was pronounced dead on arrival.

The Complaint stated two causes of action. The first alleged custodial negligence on the part of the respondent sheriff under Ohio Revised Code, §341.01 and 311.05, and prayed for damages for the conscious pain and suffering sustained by petitioner's decedent during the fire. The second cause of action was for the deprivation of Hicks' Constitutional rights under 42 U S C §1983.

A jury trial resulted in a general verdict for the petitioner in the sum of $75,000.00 on both the negligence and 42 U S C §1983 actions.

The respondent moved for a new trial on the following grounds:

(1) The verdict cannot be sus-

tained by the sufficiency and probative value of the evidence.

(2) The verdict is contrary to law.

(3) Error of law occurring at the trial and brought to the attention of the trial court by the defendant.

(4) And for other errors manifest from the face of the record.

At no point in respondent's brief did he allege misconduct on the part of counsel. Instead, respondent's brief argued that the jury based its verdict on improper grounds and that holding the Sheriff personally responsible worked a "manifest injustice". Further, respondent never addressed himself to the 42 U S C §1983 cause of action.

The trial court granted respondent's Motion for Judgment Notwithstanding the Verdict and in the alternative a new trial. The motion was granted under the power vested in the court by Ohio Civil Rule 59(D) to grant a new trial for reasons not stated in the respondent's new trial motion. Ohio Civil Rule 59(D) parallels the F R C P 59(D) and both require a judge to specify his reason for granting the motion where his reasons go beyond those in the party's motion.

The trial court granted the new trial on the following analysis, written without the benefit of a transcript of the trial proceedings:

"Reluctantly, the court finds it necessary to sustain defendant's motion for a new trial because counsel for plaintiff in the presence of the jury repeatedly stated assumptions of fact not based on evidence, inferred on several occasions that witnesses could not tell the truth about what they knew by reason of their employment and that opposing counsel were
not honorable. Also, more than once her counsel either voiced the opinion or insinuated that only plaintiff's witnesses were capable of telling the truth about the facts of this episode which has tragically caused

plaintiff much grief. In addition, plaintiff's counsel disclosed the existence of the Sheriff's official bond, a matter completely irrelevant to the trial of the issues. Further, if defense counsel's similar conduct did not evenly balance that of plaintiff's counsel, it was substantial and this court must conclude that here the failure of counsel to concentrate on what the evidence truly tended to prove was so great it did not contribute to a just verdict. Although the court has caused no record to be transcribed its recollection is clear that in over 15 years it has never presided over a jury where counsel unsalutarily engaged in making so many

statements about the case which could not advance the cause of a fair and just establishment of the truth and merits of the controversy at hand."

Petitioner then appealled the trial court's order to the County Court of Appeals. At this point, petitioner raised the issue brought up for review. In her brief petitioner argued that the right to a jury trial would in effect be taken away if the jury's verdict could be overturned by vague or incorrect grounds. (See Appendix B)

Because the Court of Appeals held that ordering a new trial was incorrect under Ohio law on the negligence issue, it did not address

the issue of whether granting a new trial on the 42 U S C §1983 issue would have been proper.

Respondent appealled the unanimous decision of the Court of Appeals to the Ohio Supreme Court affirmed the Court of Appeals on its reversal of the judgment not withstanding the verdict, but reinstated the trial court's order granting a new trial.

The Ohio Supreme Court, however, also avoided the question of whether review of a new trial order in a 42 U S C §1983 case was governed by Federal Law or State Law.

The Ohio Supreme Court also did not explicitly rule on whether

under Federal Law the jury's verdict could be overturned on a Court's own grounds when those grounds were not specific. Given its decision, which granted a new trial on state law grounds the Ohio Supreme Court must have implicitly held that new trials in 42 U S C §1983 actions are not reviewed using federal law standards.

Petitioner now petitions this court to review the Ohio Supreme Court's decision.

ARGUMENT FOR GRANTING CERTIORARI

Supreme Court Rule 17 lists two reasons applicable in the present case which are "special and important" and indicate the character of reasons for which the Supreme Court will

review a state court judgment on certiorari:

Rule 17.1(b)

When a state court of last resort has decided a federal question in a way in conflict with the decisions of another state court of last resort or of a federal court of appeals, and

Rule 17.1(c)

When a state court of last resort had decided an important question of federal law which has not been, but should be, settled by this

Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

In the present case, the federal question at issue is whether a right to a trial by jury inheres in a federal cause of action, and, if so, for what reasons a state judge may overturn the jury verdict and order a new trial.

In addressing this question the Ohio Supreme Court implicitly held that there was no federal right to trial by jury in 42 U S C 1983 cases. This holding is in conflict with the pattern of dealing with federally created causes of action apparent in

the rulings of state courts of last resort and in this court. Thus the considerations listed in Supreme Court Rule 17.1(b)&(c) weigh toward granting certiorari in the present case.

In Stobie v. Potlatch Forests, Inc. 95 Idaho 666, 518 P2d 1 (1973, as modified on denial of rehearing 1974), the Idaho Supreme Court held that in a wrongful death action brought under the federal maritime law, state courts had to judge the validity of the jury's verdict according to the standards required by the Seventh Amendment to the Constitution. The Idaho Court reasoned that when a cause of action based on federal law is brought in

state court it is the state court's duty to make certain the rights are fully protected by applying federal law to the question of whether the jury's verdict should stand. The court held that those protections required a reversal of a new trial order and reinstatement of the jury's verdict.

Though the reason the trial court had granted a new trial was, unlike here, because the verdict was against the manifest weight of the evidence, the basic rationale of that case applies in this case. A 1983 civil rights action grants federal rights which must be as fully protected in state courts as in federal

courts. Where substantiative rights, like the right to a trial by jury has been held to be part of the federal cause of action when tried in federal court, then that right must receive the same protection in state courts, including the use of federal Seventh Amendment standards for reviewing the granting of a new trial.

In reaching its decision the Idaho Supreme Court relied on language from this court's holding in Arnold v. Panhandle and Santa Fe Ry, 353 U S 360 at 361, 77 S.Ct. 840 at 841, 1 L Ed2d 889 at 891 (1957):

"The petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected as the congress intended them to be. We therefore cannot accept interpretations that nullify their effectiveness, for ... the assertion of Federal rights when plainly and reasonably made, is not to be defeated under the name of local practice. David v. Wechsler 263 U S 22 at 24; 44 S Ct. 13, 14, 68 L Ed 143."

In Arnold v. Panhandle this Court reversed a state court's grant of a new trial. The state court had

granted a new trial on the ground that the jury's general verdict and its answers to the special interrogatories appeared to be inconsistent. This court granted certiorari and reversed on the ground that by applying federal law, with its high stress on the importance of the jury, the answers and general verdict would be read as consistent if at all possible.

Applying the reasoning of either of the above cases to the present case results in the conclusion that the protections to the right to a jury trial afforded by federal law should have been applied in the present case. 42 U S C 1983 grants a

federal cause of action just as the FELA and federal maritime law do. Under federal practice, a 1983 cause of action for damages is granted a trial by jury, just as the FELA and federal maritime actions are. See Richards v. Smoltich 359 F Supp 9 (1973, DC Ill) and Burch v. Carmody 377 F Supp 1157 (1974, DC NY). Further the great stress placed on the right to a jury trial by the Seventh Amendment and by the Congress argues that a right to a jury trial inhers in 42 U S C §1983. In Dice v. Akron Canton and Youngstown Railroad Company 342 U S 359, 72 S Ct. 312 96 L Ed 398 (342 U S at 363, 96 L Ed at 404) this court held that a right to trial by

jury on all factual issues of fraud in Federal Employer's Liability Act case brought in state court. This court held that the right to a trial by jury is a basic and fundamental feature of our system of federal jurisprudence "and that it is part and parcel of the remedy afforded railroad workers under the Employers Liability Act" (342 US at 363) In addition, this Court pointed out that consistent nationwide application of the Act was an important consideration (at 362).

This Court concluded: "It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere

local rule of procedure for denial in the manner that Ohio has here used".

Thus, though the specific issue in this case, the standards for reviewing a state trial courts granting of a new trial in a 42 U S C 1983 case on the basis of "manifest injustice" does not seem to have arisen, the decisions of the state courts of last resort and of this court argue strongly against the decision of the Ohio Supreme Court. Further, to the extent that the applicability of the federal jury trial rights to 1983 cases in state courts hasn't been directly established by this Court, an

"important question of federal law" remains open. Thus the considerations stated in Rule 17 all point toward the importance of granting certiorari in this case.

Thus a landmark decision of this court supports petitioners claim that a federal right to a trial by jury sought to inhere in a 42 U S C §1983 action. Of course, Dice v. Akron Canton & Youngstown Railraod supra involved an FELA action and not a civil rights action, but the Dice rationale has been applied to other acts such as the federal maritime act, in Stobie below.

Further, Congress' language in granting a cause of action under

the FELA 45 U S C §51 et seque is identical to that used in 42 U S C §1983 -- neither of them explicitly mention a right to a trial by jury. Thus the fact that the Congress favors trial by jury, and that trial by jury is a fundamental part of the federal system gives as solid a reason to hold that Congress intended a jury trial in 42 U S C § 1983 actions to hold that Congress intended a jury trial in FELA actions.

In federal court, the protections offered the trial jury's verdict are strong and have grown stronger in recent years. Under F R C P 59(D) the judge must specify the grounds for his new trial order, if

the grounds, as in the present case, go beyond the grounds listed by the moving party.

The purpose of this requirement is to allow the new trial order to be appealed, and to keep the judge from overturning the verdict without substantial grounds. As a result, the rule serves as a fundamental protection to the jury's verdict. It is not a mere matter of procedure. If it is not followed, as it was not in this case, the result is that a trial court can usurp the jury's function by overturning the verdict on grounds too vague to allow for a successful appeal.

Since the rule offers a fundamental protection of the right to trial by jury, the rule must be applied in state courts where federal causes of action are being tried. This additional federal question and the importance of the right included is another ground for granting certiorari in this case.

If the trial court order is taken to have been one raised by respondent, i.e., that the verdict is against the mainfest weight of the evidence and thus caused a miscarriage of justice, then a different set of consideration come into play. Under Lind v. Schenley Industries, Inc., 278 F.2d 79 (3rd Cir. 1960) a grant of a

new trial motion will be scrutinized more carefully than a denial of a new trial.

Under its analysis, the grant of a new trial should be most stringently reviewed when the grounds for granting the new trial is that the verdict was against the weight of the evidence. The reason is that the jury's judgment of the strength of the evidence, particularly in a straight forward case, should not be overturned lightly. Weighing the evidence is precisely what the jury is set up to do. Applying the Lind rationale to the present case, to the extent the judge's new trial order was based on his appraisal of the evidence brought

forth, it should be judged under the strict federal standards. In contrast, under the Ohio law applied to this case, the trial judge is given great discretion when testing to see whether the jury's verdict works a manifest injustice.

As a result, had the applicable federal law been applied, either the new trial order should have been rejected as not being explicit or the new trial order should have been rejected because it failed to meet the federal test in Lind.

APPENDIX A

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Supreme Court Opinion

Jenkins, Admrx. Appellee, V. Krieger, Sheriff, Appellant

(Cited as Jenkins v. Krieger (1981), 67 Ohio St. 2d)

Negligence - Wrongful death - Death of prisoner in jail cell-Judgment Not Withstanding Verdict erroneously granted, when-New trial warranted, when.

(No. 80-1376-Decided July 22, 1981)
APPEAL from the Court of Appeals for Cuyahoga County.

On the morning of May 15, 1971, Bobbie Lee Hicks was a prisoner confined in the Cuyahoga County Jail in the custody of the appellant, Ralph Krieger, who was then Sheriff of Cuyahoga County. Hicks had been so confined since the preceding October awaiting sentence after having been convicted of a felony. Immediately after Hicks' cell and that holding another prisoner, one Scharf, were opened, a fight between the two men broke out as an apparent aftermath of an argument that had been carried on throughout the night. During the altercation, Hicks was struck repeatedly on the head and face with a piece of metal wrapped in a sock[1].

Scharf, in turn, received a number of cuts from a razor blade which Hicks had encased in the cover of a book of matches. Resultantly, both men were removed to a hospital for treatment of their injuries. Upon return, each was placed in an isolation cell because of their infraction of the regulation proscribing fighting in the jail, and for their personal safety. Scharf was lodged in a cell on the fifth floor of the jail, and Hicks was placed in one located on the eighth floor.

Although the operations officer of the jail attempted to question Hicks about the fight, he refused to talk and further interrogation was postponed. May 15, 1971, fell upon a

Saturday, a day set aside for visitation at the jail between 1:00 and 5:00 p.m., and the guards and other personnel were occupied with the special efforts required to maintain security.

At approximately 1:00 p.m.[2], a prisoner observed smoke coming from Hicks' cell and pounded upon the walls in an effort to summon help. According to another inmate, who reported the pounding, a jail trustee relayed the statement of a deputy that whatever the problem was, it would have to wait until visiting hours were over.

At 6:00 p.m., Hicks' cell was opened so that he could be served with

dinner. He was found wrapped within the mattress from his cot, which had been partially consumed with fire.[4] Hicks was burned on his head, face, neck, shoulders, chest and hand, and the deputy and trustee who had opened the cell called immediately for medical assistance. The jail nurse[5] who responded believed that she detected a pulse in the carotid, although Hicks was not breathing, and he was thereafter taken to a hospital. Upon arrival at the hospital, however, he was pronounced dead. The coroner ultimately concluded that the cause of death was asphyxia by inhalation of smoke and carbon monoxide.

A number of burned matches and extinguished cigarette butts were found near the burned mattress. The mattress itself was one commonly supplied to jails and was covered with a fire resistant material. The core of the mattress would, however, smolder and burn after having been ignited. As much as one-third of the mattress had been burned,[6] and when first viewed, those parts of Hicks' body that had been injured were in proximity to the burned parts of the mattress.

The complaint filed by Maggie Jenkins, Hicks' mother and administratrix of his estate, first alleged a cause of action for his

wrongful death.[7] On the day trial of the issues commenced, the plaintiff was granted leave to amend her complaint to included a cause of action for damages arising from the alleged deprivations of Hicks' civil rights under Section 1983, Title 42 of the United States Code.

At the close of the plaintiff's case-in-chief, the defendant moved for a directed verdict. That motion was overruled, as was a similar motion made after all the evidence had been submitted. Ultimately, the jury returned a verdict for the plaintiff in the sum of $75,000.[8]

The defendant filed a timely motion for judgment notwithstanding the

verdict and, alternatively, for a new trial.[9] The trial court granted the motion and ordered that plaitiff's complaint be dismissed and judgment awarded to defendant, non obstante veredicto. The entry further provided that if such order was found to have been erroneously made, the defendant was then to be granted a new trial.

Plaintiff appealed the decision of the trial court. The Court of Appeals reversed the order granting judgment for the defendant, and, alternatively, granting the motion for a new trial, and entered judgment for the plaintiff.

This cause is now before this court pursuant to the allowance of a motion to certify the record.

Mrs. Carole R. Turoff and Mr. Jack N. Turoff, for appellee.

Mr. John T. Corrigan, prosecuting attorney and Ms. Karen A. Hassenzahl, for appellant.

Per curiam. The pivotal issue presented for review in this appeal is whether the Court of Common Pleas erred in granting defendant-appellant's motion for judgment notwithstanding the verdict or, in the event such order was found to be erroneous, mandating a new trial of the issues.

The trial court in its opinion accompanying the order granting the motion concluded that it had erred in failing to direct a verdict for the defendant at the close of plaintiff's evidence.[10]

Plaintiff's action against the sheriff for damages stemming from his alleged custodial negligence was predicated, necessarily, upon two secions of Ohio Revised Code.

R.C. 341.01 provides:

"The sheriff shall have charge of the county jail and all persons confined therein. He shall keep such persons safely, attend to the jail, and govern and regulate the jail according to the rules and regulations

prescribed by the court of common pleas."

R.C. 311.05 provides:

"The sheriff shall be responsible for the neglect of duty or misconduct in office of each of his deputies."

Despite its ultimate conclusion, in retrospect, that the plaintiff had failed to show negligence attributable to the defendant as sheriff, the trial court in its opinion rationalizing the granting of defendant's post trial motion found "that the rule of evidence known as res ispa loquitur applies with peculiar force in this case***."

It is axiomatic that res ipsa loquitur is a rule of evidence that

permits the trier of fact to infer negligence on the part of the defendant from the circumstances of the injury. To warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: "(1) (t)hat the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; that (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred in ordinary care had been

observed." Hake v. Wiedermann Brewing Co. (1970), 23 Ohio St. 2d 65, 66-67.

Beyond cavil, the proximate cause of Hicks' death was the fire in his cell. The trial court reasoned that although Hicks was confined in an isolation cell for good cause, [11] i.e., enforcement of the rule against fighting, the cell contained no device by which help might be summoned in an emergency. This prompted the conclusion that the jury was free to infer negligence and, or, contributory negligence. Then, in order to exculpate the defendant from the legal consequence of the application of the doctrine of res ipsa loquitur, the court held that becuase the board of

county commissioners had not provided the defendant any funds that would have enable him to provide emergency alarm facilities and "another deputy or two" to afford attention to prisioners in isolation, the sheriff could not be held liable for Hicks' death.

The Court of Appeals rejected the trial court's rationale, declaring that it must fail first because of the mandate expressed in R.C. 341.01 that prisoners be kept safely and, secondly, because the facts of the case did not justify a conclusion that the adequacy of the sheriff's staff had any bearing upon whether there were negligent acts committed by

deputies of the sheriff that proximately caused the death of Hicks. The Court did not comment upon the propriety of the application of the doctrine of res ipsa loquitur.[12] It did conclude from its comparison of the evidence, however, that reasonable minds could have concluded, inter alia, that when Hicks was placed in the isolation cell, jail personnel failed to search his person as required by established policy; that, resultantly, they failed to discover the matches that were the cause of the fire,[13] and that prompt attention had been given when the fire was noticed, Hicks would have lived.

R.C. 341.01 is a codification of the common law duty of a sheriff to employ ordinary care in keeping the prisoners confined to his custody and in protecting them from hazards that are, or should be, known to him. See Justice v. Rose (1957), 102 Ohio App. 482, 484-485. Whether the decision of the Court of Appeals has delineated a greater duty for a sheriff than that of exercising ordinary care for the safekeeping of his prisioners, or has implicity made him an insurer of their safety by excluding the traditional criterion of foreseeability of the risk engendered by the environment in assessing the degree of care owed to Hicks--an argument advanced by

appellant - is a question that we do not now decide because we agree with the Court of Appeals that there were sufficient evidence to enable the jury to conclude that the negligence of appellants deputies contributed proximately to Hicks' death. Accordingly, we affirm that part of the judgment of the Court of Appeals reversing the trial court's order that judgment be entered for the defendant notwithstanding the verdict.[14]

We come now to consider the appellant's proposition that the Court of Appeals erred in reversing the order granting the motion for a new trial. Appellants' argument is that where, as pursuant to Civ. R. 59 is

sought on appeal, [15] an appellate court must find that the trial court abused its discretion in granting the new trial.

Where a trial court is authorized to grant a new trial for a reason that requires the exercise of a sound discretion, the order granting the new trial may be reversed only upon a showing of abuse of discretion by the trial court. Youngwirth v. McAvoy (1972), 32 Ohio St. 2d 285, 286; Rohde v. Farmer (1970), 23 Ohio St. 2d 82, paragraph one of the syllabus.

In Rohde, supra, we noted the basic distinction, one of substantially universal recognition, between the action of a trial court in granting a

new trial and its action in granting judgment notwithstanding the verdict. We stated, at page 93, quoting Holland v. Brown (1964), 15 Utah 2d 422, 426, 394 P. 2d 77:

"In appraising this action of the trial court, it is important to distinguish between the granting of a new trial and entering of a judgment notwithstanding the verdict. As to the former, the trial court is indeed endowed with a wide latitude of discretion in granting a new trial when he thinks the jury's verdict results in manifest injustice. This power is necessary to fulfill his function of maintaining general supervision over litigation to guard

against miscarriage of justice which sometimes occur at the hands of juries.***'"

In the case sub judice, the trial court's decision on the motion for a new trial involved questions of fact. Consequently, the generally accepted rule is that a reviewing court should view the evidence favorably to the trial court's action rather than to the jury's verdict. The predicate for that rule springs in part, from the principle that the discretion of the trial judge in granting a new tiral may be supported by his having determined from the surrounding circumstances and atmosphere of the

trial that the jury's verdict resulted in manifest injustice. Id. at 94.

Although in the opinion supporting its decision the trial court accented the conduct of trial counsel as a factor compelling the granting of the motion, a comparison of all the parts of the opinion supports the conclusion that the trial judge determined that, cumulatively, the aberrations, both procedural and substantive, that pervade this record mandated a new trial of the issues free from such influences.

This case falls within the ambit of Rohde, and the Court of Appeals erred in reversing the trial court's granting of a new trial without

considering matters beyond misconduct of counsel and the use of improper tactics that would justify a new trial where the trial court was convinced a manifest injustice had been done.

The record persuades us that the original assessment of the magnitude and ultimate result of the errors that had occurred in a lengthy, sometimes heated trial of a case with an unusually bizarre scenario was correct, and that the trial court did not abuse its discretion in concluding that manifest injustice could be averted only be a retrial.

The judgment of the Court of Appeals is affirmed in part and reversed in

part, and the cause is remanded to the Court of Common Pleas for a new trial.

Judgment affirmed in part and reversed in part.

CELEBREZZE, C.J., SHANNON, MAHONEY, SWEENEY, LOCHER AND HOLMES, JJ., concur

C. BROWN, J, concurs in part and dissents in part.

SHANNON, J., of the First Appellate District, sitting for W. Brown, J.

Mahoney, J., of the Ninth Appellate District, sitting for P. Brown, J.

CLIFFORD F. BROWN, J., concurring in part and dissenting in part.

I concur in the affirmance of that part of the judgment of the Court of Appeals reversing the trial court's judgment for defendant notwithstanding the verdict. The majority opinion well articulates the reasons for such affirmance.

I dissent from the part of this court's opinion reversing the Court of Appeals and affirming the trial court's grant of a retrial on plaintiff's claims. It is my view the decision to grant a new trial was based on a question of law only.

Therefore, I disagree with the standard of review used by this Court, a standard only appropriate when the trial court order a new trial due to

questions of fact, such as when the jury verdict is against the manifest weight of evidence. Rohde v. Famer (1970), 23 Ohio St.2d 82, 94: Youghwirth v. McAvoy (1972), 32 Ohio St. 2d 285, 286. This was not the case here, despite the majority's bland assertion that the "the trial court's decision on the motion for a new trial involved questions of fact."[16]

Where the grant of a new trial is based on the weight of the evidence requiring exercise of discretion of the trial judge the controlling legal principle is contained in Rohde v. Farmer, supra, paragraph two of the syllabus as follows:

"Where a new trial is granted by a trial court, for reasons which involve no exercise of discretion but only a decision on a question of law, the order granting a new trial may be reversed upon the basis of a showing that the decision was erroneous as a matter of law."

The fact that a question of law involves a consideration of the facts or the evidence, does not turn it into a question of fact or raise a factual issue; nor does that consideration involve the court in weighing the evidence or passing upon its credibility. This proposition is well expressed in O'Day v. Webb (1972), 29

Ohio St. 2d 215, paragraphs one and two of the syllabus:

"1. When a trial court has specified as the reason for granting a new trial its error in submitting an Youghwirth v. McAvoy (1972), 32 Ohio St. 2d 285, 286. This was not the case here, despite the majority's bland assertion that the "the trial court's decision on the motion for a new trial involved questions of fact."[16]

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expressed in O'Day v. Webb (1972), 29 Ohio St. 2d 215, paragraphs one and two of the syllabus:

"1. When a trial court has specified as the reason for granting a new trial its error in submitting an issue to the jury, the question before the appellate court on review is one of law, not of abuse of discretion; and the appellate court has the duty to decide whether, as a matter of law, the trial court eerred in correcting itself by granting a new trial."

"2. The fact that a question of law involves a consideration of the facts or the evidence, does not turn it into a question of fact or raise a factual issue; nor does that consideration

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See, also, Ace Steel Baling v. Porterfield (1969), 19 Ohio St. 2d 137, 139, footnote 2.

issue to the jury, the question before the appellate court on review is one of law, not of abuse of discretion; and the appellate court has the duty to decide whether, as a matter of law, the trial court erred in correcting itself by granting a new trial."

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involve the court in weighing the evidence or passing upon its credibility."

See, also, Ace Steel Baling v. Porterfield (1969), 19 Ohio St. 2d 137, 139, footnote 2.

In the case sub judice, the trial court granted a new trial because, in its view, the negligence could not be charged to defendant sheriff since he lacked sufficient funds to deal with emergencies of this type, and because counsel for both parties engaged in various alleged misconduct. These reasons do not involve the weighing of evidence or exercise of discretion so as to constitute questions of fact.[17] The decision was based on a question

of law, an order reversible on a showing that it was erroneous as a matter of law. Rohde v. Farmer, supra, paragraph two of the syllabus. The Court of Appeals correctly reversed the trial court's grant of a new trial, and was not required to consider matters beyond those stated by the trial judge as the basis for his decision. Accordingly, I believe we should adopt and follow the succint and cogent analysis of Judge Day expressing the unanimous view of the Court of Appeals that the record does not warrant a new trial and that the verdict does not merit reversal because of misconduct of counsel.[18]

This court today, by apparently permitting trial courts to grant new trials solely because they may be "convinced a manifest injustice has been done," gives carte blanche to trial judges to substitue their decision for that of the jury. Such an arbitrary and capricious state of affairs reduces the "inviolate" right to a jury trial in civil cases to a mere sham, a condition to which I am unalterably opposed.

[1] The metal object was a stopper from a sink within the jail, and the weapon made from it when wrapped in a sock and swung by the hand was referred to at trial as a "soap jacket."

[2] Hicks had been given his lunch and placed in his cell at about 12:45 p.m.

[3] This prisoner testifed that he thought Hicks was cooking coffee in his cell because, upon occasion, inmated would use waxpaper from bread wrapping for such purposes.

[4] There was no evidence of any active combusion within the mattress or any smoke in the cell at this time.

[5] The trustee who had given lunch to Hicks in the forenoon testified that Hicks was restrained at a wrist and the opposite ankle by leather straps attached to his cot. The nurse and several other witnesses testified that they saw no restraints. The coroner, during his postmortem examination,

found no evidence that Hicks had been so shackled.

[6] The coroner determined that Hicks' death was probably accidental in nature, and an expert called by the plaintiff-appellee as if upon cross-examination testified that careless smoking had caused the fire.

[7] Jenkins asserted that the defendant sheriff had vailed, neglected and refused to care properly for the welfare of her son, and that such wilful misconduct and negligence caused his death.

[8] Although counsel for plaintiff referred during vior dire of prospective jurors to the defendant sheriff's official bond, his insurers

apparently denied coverage for disabilty arising from negligent acts, and the prosecuting attorney of Cuyahoga County acted as counsel for the sheriff at all stages of the action sub judice.

[9] The Court received the motion as having been made pursuant to Civ. R. 50(B) and Civ R. 59(A).

[10] The trial court wrote: "The Court has concluded that it erred in failing to direct a verdict for plaintiff (sic) at the close of plaintiff's evidence because the evidence fails to show negligence which can properly be charged to the defendant." It is obvious that the use of the word "plaintiff" was improvident, and that

the court intended to state "defendant."

[11] The trial court wrote: "He was not there because of capriciously unconsidered or malevolently motivated act of defendant or any deputy or by virtue of any act amounting to a denial of any constutional right."

[12] The defendant-appellant argues in this court that the trial court erred in instructing the jury on the law of res ipsa loquitur. However, the record demonstrates that the counsel for the sheriff failed to object to the charge pursuant to Civ. R. 51(A). Resultantly, the asserted error was not preserved for review. Youngwirth v. McAvoy (1972), 32 Ohio St 2d 285.

[13] Paradixically, there is evidence in the record that the jail regulations promulgated by the Court of Common Pleas required the sheriff to supply cigarettes and tobacco to prisoners who did not have the means to procure such items for themselves.

[14] The Court of Appeals, in electing to reverse the trial court on the ground that there was palpable evidence of custodial negligence, avoided ruling upon the adequacy of proof by plaintiff of her claims based upon depreviation of constitutional rights. The court did, however, recognize the anomaly presented by the trial court's issuance of jury instructions on that issue and the

statement in its opinion that it had granted a directed verdict for the defendant on such part of plaintiff's complaint.

15 The trial court in its opinion stated: "On reviewing the entire cause the court has concluded that it must ***[g]rant defendant's motion for a new trial in the sound discretion of the court as authorized by Civil Rule 59(D)."

16 The opinion of the trial judge contained in the court's reasons for granting a new trial "Still on reviewing this entire cause the court has concluded that it must:"***

"2. Grant defendant's motion for a new trial in the sound discretion of

the court as authorized by Civil Rule 59(D).

"The court has concluded that it erred in failing to direct a verdict for *** [defendant] at the close of plaintiff's evidence because the evidence fails to show negligence which can properly be charged to defendant. The evidence completely fails to show that defendant sheriff has been provided any funds which would have enabled him to provide emergency alarm facilities and another deputy or two so that the attention given to visitors during visiting hours would not impair the attention given to prisoners in isolation during non visiting hours.***[T]he fault must

rest on the Board of County Commissioners whose duty it is to make such provision***

"Reluctantly, the Court finds it necessary to sustain defendant's motion for a new trial, because counsel for plaintiff in the presence of the jury repeatedly stated assumptiones of fact not based on evidence, inferred on several occasions that witnesses could not tell the truth about what they knew by reason of the employment and that opposing counsel were not honorable.*** In addition, plaintiff's counsel disclosed the existence of the Sheriff's official bond, a matter completely irrelevant to the trial of

the issues. Further, if defense counsel's similar conduct did not evenly balance that of plaintiff's counsel, it was substantial and this court must conclude that here the failure of counsel to concentrate on what the evidence truly tended to prove was so great it did not contribute to a just verdict."

The trial court also stated in its opinion as follows:

"Plaintiff argues vigorously that the judgment should not be disturbed because"***

"4. Defendant's allegation that in the circumstances there was a resumption that decedent died as a result of his own negligence was not

overcome by defendant's evidence is incorrect because negligence is never presumed, a proposition with which this court concurs.

III

"That defendant's alternative motion for a new trial is also unwarranted, in plaintiff's view because:

"(1) the allegation that "to hold the sheriff personally liable for this verdict would be totally unjust" is irrelevant in light of Ohio's Revised Code Sections 341.01 and 311.05 a propositions in which this court concurs.

"(2) the verdict returned is not against the manifest weight of the evidence;

"(3) the $75,000 verdict is not excessive***

"***

"Consequently, the jury was at liberty to infer negligence and/or contributory negligence or the lack of either as to both plaintiff's decedent and defendant, as in their judgment, might best advance the cause of justice.***"

These reasons all involve erroneous legal propositions and in no way concern the "sufficient evidence" or "weight of the evidence".

[17] The trial court specifically and unambiguously ruled out questions of fact by stating in its Opinion that plaintiff was entitled to a directed

verdict on the issue of liability, that the issues of negligence and contributory negligence were for jury determination, and that the amount of the verdict was not excessive.

[18] The Court of Appeals addressed this issue as follows:

"The court below cited Civil Rule 59(D) to sustain its position granting a new trial. It is evident from the trial court's comment that both sets of trial counsel, represent the plaintiff and the defendant, were guilty of unbecoming conduct suggesting a lack of professionalism. However, the record does not warrant a new trial. The verdict of the jury does not merit reversal because of the

tactics and misbehavior of counsel on both sides. The court's instructions to the jury at the conclusion of the case cured any error which might have occurred in this area."

COURT OF APPEALS OF OHIO

EIGHTH DISTRICT

NO. 39459

MAGGIE JENKINS, ADMINISTRATRIX
Plaintiff-Appellant

vs.

RALPH E. KREIGER
Defendant-Appellee

Appeal From
Common Pleas Court
No 898,861

JOURNAL ENTRY
AND
OPINION

Date Aug. 14, 1980

DAY, J.:

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

This is an action for damages for the conscious pain and suffering

endured by plaintiff's decedent, Bobbie Lee Hicks, prior to his death. This actions sound in negligence. Combines with this is an action for damages due to alleged deprivations of his constitutional rights.

At the time of the incidents in question, Hicks was incarcerated in the Cuyahoga County Jail. Defendant-Appellee, Ralph E. Kreiger (appellee) was then Sheriff of Cuyahoga County. These claims are pursued by Hicks' mother, plaintiff-appellant, Masggie Jenkins (appellant), in her capacity as Administratrix of his estate.

The case was tried to a jury which returned a general verdict in favor of

plaintiff in the amount of $75,000. The trial court granted defendant's motion for judgment notwithstanding the verdict and alternatively granted defendant's motion for a new trial. For reasons adduced below both the judgment N.O.V. and the alternative motion for a new trial are reversed and the judgment entered for the appellant.

On May of 1971, Bobbie Lee Hicks had already been confined to the Cuyahoga County Jail for several months. His cellmate was one Robert O'Neal, a range boss[1] in the jail.

Because of the nature of his duties as range boss, O'Neal's (and consequently Hicks') cell was normally

opened before the rest. On May 14, however, their cell was opened last. The first cell opened was that of one Leroy Scharf although his was usually opened last (Tr. 1036).

Scharf, who had participated in an ongoing argument with Hicks' most of the night, proceeded to Hicks' cell armed with a "soap jacket", a piece of iron held in a sock (Tr. 1037). When Hicks' cell was opened, Scharf attacked him and began hitting him on the head with the weapon. Hicks defended himself with a razor blade (Tr. 1041). The deputies watched the fight without attempting to stop it (Tr. 1041).

Hicks was taken to a nearby hospital where he was treated for his injuries. He was returned to the jail the following morning[2] at approximately 10:30 a.m., at which time he was placed in an isolation cell on the eighth floor. Lunch was served to Hicks at 11 a.m. by a trustee who noticed that Hicks was restained by leather straps attached to one wrist and one ankle and inferentially to the bed (Tr. 513-514).

At approximately 1 p.m., a prisoner in a nearby isolation cell smelled smoke coming from Hicks cell and began to kick the walls and called for help (Tr. 898-991). A range boss in the dormitory near the isolation area

heard only the pounding but received no response to his inquiries from the isolation area. He asked a trustee to notify one of the guards. The trustee returned to say that the deputy had stated that whatever it was it would have to wait until visiting hours were over (Tr. 476, 1088-1093).

At 6 p.m. Hicks' cell was opened for the purpose of serving him dinner. He was discovered lying on a partially burned mattress and was himself noticeably burned. The fire was completely out by this time with no trace of smoke in the air. The jail's nurse was summoned to the scene. She detected no breathing but located a slight pulse in his carotid artery.

Hicks was pronounced dead on arrival at the hospital at 6:20 p.m. The cause of death was determined to be asphyxia by smoke inhalation and carbon monoxide intoxication, as a result of a burning mattress. Matches and cigarette butts were found on the floor. The coroner determined that the death was probably accidental in nature.

The trial court entered judgment notwithstanding the verdict in favor of defendant on the ground that inadequate funds were the cause of the condition in the prison which resulted in Hicks' death. Because the Sheriff had made good use of the funds which had been made available to him by the

Board of County Commissioners, he could not be held responsible for conditions beyond his financial ability to control. Alternatively, defendant's motion for a new trial was granted on the ground of misconduct of plaintiff's counsel.

Plaintiff filed a timely appeal and assigns two errors.

Assignment of Error No. I:

"THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT."

A.

Plaintiff's negligence action against defendant is premised upon these sections of the Ohio Revised Code.

"§311.05 Conduct of deputies.

"The sheriff shall be responsible for the neglect of duty or misconduct in office of each of his deputies."

"§341.01 Sheriff to have charge of Jail.

"The sheriff shall have charge of the county jail and all persons confined therein. He shall keep such persons safely, attend to the jail, and govern and regulate the jail according to the rules and regulations prescribed by the court of common pleas."

The evidence was sufficient to enable reasonable minds to conclude that the Sheriff's deputies were negligent in their care of and attention to plaintiff's decedent and that such negligence was the proximate cause of his death.

There was testimony that Hicks sustained a severe beating at the hands of a fellow inmate while the

deputies looked on indifferently. And it could be reasonably concluded from the testimony the deputies facilitated the incident by the unusual manner in which the cells were opened on the morning of May 14 (Tr. 1036-1038).

Also, when Hicks was brought to the isolation area on the eighth floor, he was walking very slowly. When he was served lunch, he told the trustee he had a headache. The trustee informed a deputy of this fact and was allowed to take Hicks to the bathroom. The trustee testified that Hicks was restrained to the bed before he went to the bathroom and was again restrained upon his return.

Despite these circumstances, Hicks was left in solitary confinement for at least six hours without any deputy coming in to check on his condition. This failure to check was even more inexcusable in light of the testimony that a deputy was informed of a pounding noise emanating from the isolation area.

The attitude expressed by the jail personnel was that going to check the isolation area during visiting areas was difficult to accomplish. This is purportedly a result of the inadequate number of deputies available to supervise visitation and at the same time conduct rounds of the prison area. In order to maintain security,

it was stated that it would have been necessary to clear the entire floor of visitors prior to making a check of the isolation cells. But there was also testimony that it would not have taken more than two and three minutes to investigate. The risk of harm to Hicks could have been reasonably viewed by the jury as outweighing the risk attendant upon the momentary absence of the deputy during visitation. And, even if clearing the floor was the only way to safely accomplish the task, reasonable persons could conclude that the risk of harm to Hicks far outweighed the inconvenience of removing the visitors. Moreoever, the fact that

it was stated that it would have been necessary to clear the entire floor of visitors prior to making a check of the isolation cells. But there was also testimony that it would not have taken more than two and three minutes to investigate. The risk of harm to Hicks could have been reasonably viewed by the jury as outweighing the risk attendant upon the momentary absence of the deputy during visitation. And, even if clearing the floor was the only way to safely accomplish the task, reasonable persons could conclude that the risk of harm to Hicks far outweighed the inconvenience of removing the visitors. Moreoever, the fact that

noises were heard coming from isolation should have resulted in some precautionary reaction by a deputy. For there was testimony that a jail policy required investigation of all noises emanating from the isolation area (Tr. 357). This point becomes particularly compelling when it is remembered that Hicks was restrained by straps to his bed whil confined in isolation.

It appears from the evidence that jail policy required a strip down search of an inmate prior to placing him in isolation. One reason for this was to insure that neither matches nor cigarettes were taken into the cell. (Tr. 335, 518-519). Yet prisoners

were regularly placed in isolation with matches and cigarettes. Whether Hicks was thus searched is beside the point. The jury could reasonable find negligence either in failing to discover these things if he was searched, or in failing to search.

Testimony indicated that the fire was of a smoldering nature and would have been relatively easy to extinguish (Tr. 234-235). Reasonable minds could have concluded that had prompt attention been devoted to the situation, Hicks would have lived and that the combined acts of negligence were the proximate cause of death.

B.

Defendant urges that he cannot be held liable for conditions of inadequate manpower because funds were not made available to him in order or correct the situation. This argument must fail for two reasons.

First, the legislature has settled this policy question by placing the sheriff in charge of the county jail and requiring him to keep prisoners safely, R.C. §341.01. In enacting this statute, the legislature was certainly aware that the sheriff does not control the purse strings of the county. His liability for breach of the duty exists wholly apart from the issue of financial considerations. Moreover, economic considerations will

not justify deprivation of constitutional rights.[3] If the situation were otherwise, plaintiffs would be faced with an insurmountable burden of proof. Moreover, the statute obviously established a high priority for safety. This necessarily imposed a duty on the sheriff to distribute his available funds in ways to satisfy that priority.

Second, the facts of this case would justify a conclusion that the adequacy of the sheriff's staff had no bearing upon whether there were negligent acts committed by the deputies which proximately caused Hick's death. For the evidence will bear the interpretation that a relatively

slight additional effort by the sheriff and his deputies would have discovered and obviated the danger here.

whether the evidence on constitutional questions was also enough to defeat a judgment N.O.V. On re-trial all the issues will be open for proof and decision.

The first assignment of error is well taken.

ASSIGNMENT OF ERROR NO. II

"THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL."

The Court below cited Civil Rule 59(D) to sustain its position granting

a new trial. It is evident from the trial courts comments that both sets of trial counsel, representing the plaintiff and the defendant, were guilty of unbecoming conduct suggesting a lack of professionalism. However, the record does not warrant a new trial. The verdict of the jury does not merit reversal because of the tactics and misbehavior of counsel on both sides. The courts instructions to the jury at the conclusion of the case cured any error which might have occured in this area.[5]

The second assignment of error is well taken.

The judgment in the court below is reversed and judgment entered for the appellant.

This cause is reversed and judgment entered for the appellant.
whether the evidence on constitutional questions was also enough to defeat a judgment N.O.V. On re-trial all the issues will be open for proof and decision.

The first assignment of error is well taken.

U.S.C. §1983) although the trial court opinion indicates erroneously that a verdict "on this issue" was directed

for the defendant (Opinion, p. 6). See Tr. 1606-16908 for the relevant portion of the charge.

[5] The court, at transcript 1609, took note of arguments offered by counsel which were improper and declared:

"You will ignore the terms "cruel and unusual punishment" and "constitutional rights" as used in the argument of counsel as having any independent support in the evidence outside these instructions of the Court.

"Evidence was received that the Sheriff is required to post a bond required by law, as is required of all Ohio public officials responsible for the handling of money. This fact is

irrelevant to any issue in this case and is not to be considered by you for any reason in your judgment and finding of the facts in this case.

IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO

Maggie Jenkins, Administratrix of the Estate of Bobbie Lee Hicks, deceased

Plaintiff

Ralph E. Kreiger, Sheriff of Cuyahoga County,

Defendant

CASE NO. 898 861 May 2, 1978

For Plaintiff Ms. Carole Turoff and Mr. Dennis Rotman, Cleveland

For Defendant Hon. John T. Corrigan, Prosecuting Attorney; Mr. Stephen E. DeJohn and Ms. Karen Hassendahl, Assistant Prosecuting

Attorneys

Hitchcock, J. (By assignment from Paulding County,)

In this administratrix's action for pain and suffering of her decedent upon a claim of negligent care while in the custody of defendant Sheriff, 6 members of a jury of 8 returned a verdict for plaintiff in the sum of $75,000, upon which judgment was duly entered on 9/20/77 upon decedent, while in an isolation cell for cause, suffered death when a portion of his cell mattress cover and its foam component contents burned as a result of its having been set afire by

someone. Plaintiff did not submit any proof of a wrongful death action, presumably because decedent was a prisoner who for some time had no substantial income and was awaiting sentence for assault with intent to rape, a violation of R.C. 2901.24 (eff. 10/23/61, rep. 1/1/74) wherein there was high probability of sentence to imprisonment for not less than 1 or more than 15 years. This information and decedent's record was excluded from the evidence as irrelevant although it was revealed that he had been convicted of felony and was awaiting sentence. The testimony of the pathologist indicated that decedent's pain and suffering could not have continued for

much beyond 5 minutes at most and may have been as little as 2 or 3 minutes.

1.

Defendant Sheriff now moves (1) for judgment notwithstanding the verdict, or (2) in the alternative for a new trial. Rearranging his claims to comport with the applicable Civil Rule, he contends:

1. That judgment notwithstanding the verdict should now be granted because his motions for directed verdict made at the close of Plaintiff's evidence admitted conclusively shows as a matter of law on the part of the decedent contributory negligence or

assumption of the risk by the starting of a fire. Civil Rule 50(B)

2. That if judgment n.o.v. is not granted a new trial should be ordered as authorized by Civil Rule 59(A).

(1) Irregularity in the proceedings of the ...jury

***

(2) Misconduct of the jury...

(4) Excessive...damages, appearing to have been given under the influence of passion or prejudice;

***

(6) The judgment is not

sustained by the weight of the evidence...

(7) The judgment is contrary to law;

***

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application. and defendant further indicates that the court should exercise its discretion because it is "unjust" to require the Sheriff to bear this personal liability for

performing public service.

II

Plaintiff argues vigorously that the judgment should not be disturbed because:

1. Plaintiff's failure to file a reply to defendant's affirmative defenses of contributory negligence and assumption of risk is not the equivalent of admitting such alleged facts because, under Civil Rule 7(A) no such pleading is allowed except by special permission of the court. As to this contention the court agrees.

2. (a) Defendant's contention that the total evidence supporting plaintiff's claim

"was not of a material or probative nature to justify the jury's verdict " in that the only negligence plaintiff established was "that a fire occurred in her son's solitary cell" is not here. Plaintiff interprets the evidence as showing negligence becasue (1) the deputies allowed a fight to occur and watched it before finally breaking it up; this fight caused bodily injury to decedent prisoner Bobbie Lee Hicks which lead to events which proximately contributed to his physical and mental impairment which rendered him

unable to aid himself.

(b) the deputies put decedent in the isolation cell or 'hole' when he should have been either hospitalized or kept with other prisoners in light of his mental and physical condition which the sheriff's personnel knew or should have known.

(c) that as decedent had a history of seizures and mental illness and only days before answered a questionnaire "I must be insane." he should have had supervision in isolation.

(d) that the level of

communication between sheriff personnel and the psychiatric clinic as to the mental condition and stability of inmates was below what could be justly found to be ordinary care.

(e) that the deputies permitted decedent to take matches into the isolation cell "where there was a mattress which was known to be flammable and when it was known, or should have been known, that inmates thrown into the hole might be bent on self-destruction."

(f) the deputies failure to

check on the decedent for almost 5 hours, knowing he was in isolation;

(g) the deputies failed to check 3 reports of commotion from the isolation cell the afternoon of May 15, 1971 the day the decedent died either there or shortly after his removal.

(h) the deputies put decedent in a position of total helplessness and made it impossible to have cuased his own death because restrained to his cot by leather straps fastened by the deputies.

(i) there was a failure of

the deputies to ask for first-aid equipment when Nurse Barnes was originally called to the scene of the fire where decedent's body was found if the fact decedent was then alive, an opinion expressed by 1 or 2 of the defendant's witnesses.

(j) there was a failure to administer any first-aid to defendant when found, if then alive as some witnesses stated was their belief.

(k) further, the jury could reasonable have inferred from the evidence that purposeful foul play caused decedent's

death. Plaintiff then concludes here discussion with the assertion that her amended complaint charged a violation of decedent's Constitutional Rights (despite a directed verdict for the defendant on this issue), and says: "Assuming arguendo that plaintiff failed to put forth probative evidence relative to the negligence counts, nevertheless, defendant does not refute that there was enough evidence on the denial of Constitutional Rights for the jury to return the verdict that it did."

3. The court correctly overruled defendant's motion for a directed verdict at the conclusion of the plaintiff's evidence and at the conclusion of all the evidence because a fair evaluation of the evidence would have resulted in a direct verdict for the plaintiff on the issue of liability.

4. Defendant's allegation that in the circumstances there was a presumption that the decedent died as a result of his own negligence was not overcome by defendant' evidence is incorrect because negligence is never presumed, a proposition with which this court concurs.

III

That defendant's alternative motion for a new trial is also unwarranted, in plaintiff's view because:

(1) the allegation that "to hold the sheriff personally liable for this verdict would be totally unjust" is irrelevant in light of Ohio's revised code sections 341.01 and 311.05, a proposition in which this court concurs.

(2) the verdict returned is not against the manifest weight of the evidence.

(3) the $75,000. verdict is not excessive and the affidavits of 3 jurors in support of such a view should not be considered in light

of Lund V. Kline (1938) 133 Oh. St. 317, 13NE2d 575, 10 OO 411, there being no evidence of misconduct produced aliunde the record. The court concurs in these propositions.

The court finds that the rule of evidence known as res ipsa loquitur applies with peculiar force in this case, where a prisoner is held in isolation and the evidence is overwhelming that defendant was placed in one of 4 steel walled cells within a room having near its center, lavatory and toilet facilities. That at the time of the events resulting in the death of the prisoner who is plaintiff's decedent, decedent occupied one cell,

one cell was vacant, one cell was used for the storage of a variety of supplies, and one cell in the opposite half of the large room was occupied by another prisoner, one Ben Hamurlak.

The defendant was placed in isolation administratively for fighting pursuant to a standard rule or practice will known to most prisoners and enforced with fidelity and regularity. He was not there becuase of any capriciously unconsidered or malevolently motivated act of defendant or any deputy or by virtue of any acts amounting to a denial of any constitutional right. He was there by force of administrative action for reasonable cause. Nevertheless, on May

15, 1971 this cell contained no devise permitting the summoning of help for any emergency which might arise other than pounding on the walls and there was daily, during the afternoon visiting hours from 1:00 o,clock P.M. to 3 or more hours later no supervisory deputies necessarily within calling distance at all time or available for a regular check on the welfare of the prisoners in the sheriff's custody. Such checks, however, were made 3 or 4 times per hour when enough deputies were on duty.

Consequently, the jury was at liberty to infer negligence and/or contributory neglignece or the lack of either as to both plaintiff's decedent

and defendant, as in their judgment, might best advance the cause of justice. Nor will this court disturb the verdict as being excessive for a few minutes conscious pain and suffering where such is terminated by death due to fire.

IV

Still, on reviewing this entire cause the court has concluded that it must:

1. Grant defendant's motion for judgment notwithstanding the verdict as authorized by Civil Rule 50(B).

2. Grant defendant's motion for a new trial in the sound discretion of the court as authorized by

Civil Rule 59(D).

The court has concluded that it erred in failing to direct a verdict for plaintiff at the close of plaintiff's evidence because the evidence fails to show negligence which can properly be charged to defendant. The evidence completely fails to show that defendant sheriff had been provided any funds which would have enabled him to provide emergency alarm facilities and another deputy or two so that the attention given to visitors during visiting hours would not impair the attention given to prisoners in isolation during non-visiting hours. Clearly, the sheriff was doing well with what he had and it is not shown he

had any funds he could have used to obiate decedent's cause of death, the fault must rest on the Board of County Commissioners whose duty it is to make such provision. In 1971, and even now since the enactment of the Court of Claims Act R.C. 2743.01, et seq., effective 1/1/75, Ohio Counties still enjoy the doctrine of sovereign immunity and are only liable for their negligent acts in a very few specified situations.

Reluctantly, the court finds it necessary to sustain defendant's motion for a new trial, because counsel for plaintiff in the presence of the jury repeatedly stated assumptions of fact not based on evidence, inferred on

several occasions that witnesses could not tell the truth about what they knew by reason of their employment and that opposing counsel were not honorable. Also, more than once her counsel either voiced the opinion or insinuated that only plaintiff's witnesses were capable of telling the truth about the facts of this episode which has tragically caused plaintiff much grief. In addition, plaintiff's counsel disclosed the existence of the Sheriff's offical bond, a matter completely irrelevant to the trial of the issues. Further, if defense counsel's similar conduct did not evely balance that of plaintiff's counsel, it was substantial and this court must conclude that here the

failure of counsel to concentrate on what the evidence truly tended to prove was so great it did not contribute to a just verdict. Although the court has caused no record to be transcribed its recollection is clear that in over 15 years it has never presided over a jury trial where counsel unsalutarily engaged in making so many statements about the case which could not advance the cause of a fair and just establishment of the truth and merits of the controversy at hand. Consequently, if I have erred in granting defendant a judgment n.o.v. he shall nevertheless be entitled to a new trial. As this reason for a new trial cannot be precisely demonstrated

without a complete record the argument to be provided counsel per the applicable Rule in these circumstances is deferred to such time as it may be necessary should the order of the court awarding defendant judgment notwithstanding the verdict be reversed.

A judgment entry in accord with these views is filed herewith.

APPENDIX B

The following excerpts from the opinions and briefs in this case indicate that the questions presented for certiorari were timely argued and ruled on in the courts below.

The Complaint included a 42 U.S.C. 1983 action, and directed the lower

courts' attention to the fact that federally protected rights under the United States Constitution and federal law were involved!

On page 17 of the petitioner's Court of Appeals brief petitioner stated:

"Plaintiff in her Amended Complaint, alleged a claim for relief based on the defendant's violation of plaintiff's constitutional rights....In its Opinion, the trial court based its ruling solely on the lack of any evidence showing the defendant had extra funds available. The trial court did not meet squarely the question of whether or not there was enough evidence so that reasonable minds could

differ on the question of constitutional violations. Since a general verdict was returned, it was possible that the jury based its verdict solely, or at least in part, on the §1983 cause of action. That possibility alone should be sufficient to cause reversal of the trial courts' ruling."

The above passage is especially relevant since it also shows that petitioner argued that granting a new trial or judgment notwithstanding a verdict on a §1983 claim required consideration separate from that given to the negligence action.

The petitioner consistantly argued that the trial court judge had a duty

to specify the grounds for a new trial since he did so for reasons that went beyond those of the respondant's motion.

On page 24 of her brief to the Court of Appeals, petitioner noted:

"The trial court's use of vague generalities placed an unfair burden on plaintiff. Rule 59(D) requires the trial court to specify the grounds for a new trial. This was not done at the case at bar.

On page 37 of the same brief, petitioner argued:

"Rather than point out specifics which plaintiff could respond to, the trial court resorted primarily to very general and vague grounds for a new

trial. Although the trial court implied that plaintiff's counsel's behavior was the worst he had ever seen, he could not cite examples of such alleged misconduct. The type of opinion places an unduly heavy, if not impossible duty on plaintiff to refute such charges."

To see that the petitioner argued, and that the Ohio Supreme Court below decided, the right to trial by jury issue in this case, one need only inspect the dissenting opinion of Justice Clifford Brown of the Ohio Supreme Court:

"The court today, by apparently permitting trial courts to grant new trials solely because they may be

"convinced a manifest injustice has been done," gives carte blanche to the trial judges to substitute their decision for that of the jury. Such an arbitrary and capricious state of affairs reduces the "invidate" right to a jury trial in civil cases to a mere sham...

SERVICE

I certify that three copies of the foregoing Petition were mailed U. S. Postage prepaid to John T. Corrigan, Prosecuting Attorney for Cuyahoga County, at Courts Tower-Ninth Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on the _____ day of October, 1981.

John T. Corrigan is the attorney of record for Ralph E. Kreiger who is the only party required to be served. Ralph E. Kreiger's address is 49 Henry Street, Berea, Ohio 44017.

JACK N. TUROFF

Opposition

Office - Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-758

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MAGGIE JENKINS, ADMINISTRATRIX
of the Estate of Bobbie Lee Hicks,

Petitioner,

-vs-

RALPH E. KREIGER, former Sheriff
of Cuyahoga County, Ohio

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN T. CORRIGAN, Pros.
Atty. of Cuyahoga County

THOMAS P. GILL, Chief of
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ATTORNEYS FOR RESPONDENT

NO. 81-758

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

Whether a sheriff is liable for the alleged acts of his deputies under the theory of respondeat superior in a 42 United States Code §1983 action in a state court?

Whether the state courts properly applied state procedure in granting the Sheriff-Respondent a new trial when the original trial on a survivorship action resulted in a manifest injustice to the sheriff.

PARTIES

Maggie Jenkins, Administratrix of the Estate of Bobbie Lee Hicks, was the Plaintiff in the Common Pleas Court of Cuyahoga County, Ohio; Appellant in the Court of Appeals, Eighth Appellate District; Appellee in the Ohio Supreme Court and Petitioner herein.

Ralph E. Krieger, former Sheriff of Cuyahoga County, Ohio, was the defendant in the Common Pleas Court of Cuyahoga County, Ohio; Appellee in the Court of Appeals, Eighth Appellate District; Appellant in the Ohio Supreme Court and Respondent herein.

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STATEMENT

The case originated as a complaint filed by Maggie Jenkins, Administratrix of the Estate of Bobbie Lee Hicks against Ralph E. Kreiger in his capacity as Sheriff of Cuyahoga County, Ohio. The complaint alleged the wrongful death of the Administratrix's son, Bobbie Lee Hicks, while he was incarcerated in the Cuyahoga County Jail.

On April 7, 1977, Judge Sam Zingale overruled the Administratrix's Motion for Leave to Amend Complaint. (R.p. 5). Later, on what was to be the day of trial, the Petitioner was permitted to amend her complaint to become a survivorship and civil rights action. 42 United States Code §1983. (R.p. 5 & 6). Petitioner's amended complaint was presented to the Court but never filed with the Clerk of Courts.

On May 15, 1971, Bobbie Lee Hicks died as a result of a fire set to a mattress in his isolation cell of the county jail.

On August 23, 1977, the trial commenced in Common Pleas Court (R.p. 10). Testimony was taken and depositions submitted. At the close of Petitioner's evidence, the Respondent made a Motion for a Directed Verdict. (R.p. 50), which was overruled by the trial court. (R.p. 64). Again, at the close of all of the evidence, Respondent made a Motion for a Directed Verdict (R.p. 136), which was denied by the trial judge. (R.p. 136).

The jury returned a general verdict for the Petitioner and awarded Petitioner $75,000.00 in damages. On October 4, 1977, Respondent filed a Motion for a Judgment Notwithstanding the Verdict and in the alternative a Motion for a New

Trial. (R.p. 163). The trial court granted Respondent's Motion for a Judgment Notwithstanding the verdict and alternatively, granted Respondent's Motion for a New Trial. (Petition for Certiorari, Appendix A, p. 104).

The Petitioner appealed the decision of the trial court granting Respondent a judgment notwithstanding the Verdict and a new trial to the Court of Appeals, Eighth Appellate District. The Court of Appeals reversed the decision of the trial court and entered judgment for the Petitioner.

The Respondent appealed the Court of Appeals decision to the Ohio Supreme Court. The Ohio Supreme Court affirmed the Court of Appeals' reversal of the trial court's granting a judgment notwithstanding the verdict and reversed the Court of Appeals' decision denying the

Respondent a new trial. The Ohio Supreme Court remanded the case to the Court of Common Pleas for a new trial.

The Petitioner is seeking to appeal the decision of the Ohio Supreme Court to the United States Supreme Court.

REASONS FOR DENYING THE WRIT

The Petitioner has alleged that the within case calls within Rule 17.1(b) and Rule 17.1(c) of the Rules of the Supreme Court of the United States. Therefore, certiorari should be granted. The Petitioner has incorrectly stated the nature of the case in order to characterize the case as one of a federal nature.

The decision of the Ohio Supreme Court involved no federal question, which would be in conflict with another state court of last resort or a federal court of appeals to fall within the confines of Rule 17.1(b) of the Rules of the Supreme Court. Nor, did the Ohio Supreme Court decide an important federal question, which has not been decided or is in conflict with applicable decisions of the United States Supreme Court to fall within Rule 17.1(c) of the Rules

of the Supreme Court of the United States.

The Petitioner alleged in her amended complaint a 42 United States Code §1983 civil rights action. The issue raised during appeal was whether the sheriff was liable for the alleged negligent acts of his deputies under the theory of respondeat superior in a §1983 civil rights action. The federal case law has consistently held that the doctrine of respondeat superior does not apply in 42 U.S.C. §1983 civil rights actions. Public officials are not liable for the actions of their subordinates in a §1983 action under the theory of respondeat superior. Wilson v. Beebe, 612 F.2d 275 (6th Cir. 1980); Monell, et al. v. New York Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed. 2d 611 (1978); Grillo v. Sielaff, 414 F. Supp. 272 (D.C. Ill. 1976); Butler v. Jenkins,

450 F. Supp. 574 (E.D. Tenn., 1978); Parrilla v. Cuyler, 447 F. Supp. 363 (E.D. Pa. 1978); Cotton v. Hutto, 577 F. 2d. 453 (8th Cir. 1978); Rizzo v. Goode, 423 U.S. 362, 96 S. Ct. 598, 46 L.Ed. 2d 561 (1976); Owens v. Haas, 456 F. Supp. 1009 (E.D. N.Y. 1978); and Leite v. City of Providence, 463 F. Supp. 585 (D.R.I. 1978).

Therefore, the Petitioner has no cause of action against the sheriff under a §1983 civil rights action. With no proper §1983 action against the Respondent in the state court, Petitioner's claim of a substantial federal question must fail. The remaining survivorship action, the other part of Petitioner's amended complaint, involves only a question of state law.

Petitioner has also alleged that the Ohio Supreme Court's granting of a new

trial to Respondent denied the Petitioner's rights and protections to a jury trial afforded by the United States Constitution and federal law. Petitioner's assertions are all premised upon there being a viable §1983 U.S.C. civil rights action, which as discussed above, was not a proper cause of action against the Respondent.

The Ohio Supreme Court granted the Respondent a new trial for the reason that a manifest injustice had been done. Petitioner incorrectly asserts that the Ohio Courts should have used the Federal Rules of Civil Procedure, specifically, Rule 59, F.R.C.P. instead of the Ohio Rules of Civil Procedure with regards to the new trial. Even though Petitioner asserted a §1983 civil rights action, the state courts must use the state rules of procedure. The Petitioner has con-

fused the difference between procedure and substantive law.

The Respondent's rights to a fair trial were infringed upon by a bizarre trial which resulted in a manifest injustice to the Respondent. The Ohio Supreme Court properly remanded the case for a new trial in accord with the trial court's decision to grant the respondent a new trial under Rule 59 Ohio Rules of Civil Procedure (Petition for Certiorari, Appendix A, p. 53 and p. 59). The granting of a new trial to Respondent based upon the survivorship action does not violate any federal right of the Petitioner, nor was it contrary to the federal case law.

Since Petitioner's civil rights action under §1983 is not applicable to the present case, Respondent will not answer Petitioner's claim that a federal right to a jury trial should inure in all

§1983 actions.

In sum, Respondent submits that the Ohio Supreme Court properly granted a new trial in a case which involved no federal question.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari be denied.

Respectfully submitted,

JOHN T. CORRIGAN, Pros.
Atty. of Cuyahoga County

THOMAS P. GILL, Chief of
Civil Division,
Assistant Prosecuting Atty.
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ATTORNEYS FOR RESPONDENT

SERVICE

I certify that three copies of the foregoing Brief in Opposition to Petition For Writ of Certiorari were mailed first class mail, United States postage prepaid to Jack N. Turoff, 1801 Superior Building, 815 Superior Avenue, Cleveland, Ohio 44114, on 16th day of November, 1981.

Jack N. Turoff is the attorney of record for Maggie Jenkins, Administratrix, Petitioner herein, and is the only party required to be served.

THOMAS P. GILL